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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Kenneth A. Barton II

Serial No. 75/915,192

Mick A. Nylander, Esq. for Kenneth A. Barton II.

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(Chris A.F. Pedersen, Managing Attorney).

Before Simms, Hairston and Drost, Administrative Trademark
Judges.

Opinion by Drost, Administrative Trademark Judge:

Kenneth A. Barton II (applicant) filed an application
to register the mark PHASHIONS (in typed form) on the
Principal Register for goods ultimately identified as
"clothing for men, women and children, namely athletic
shirts, pants, slacks, shorts, jackets, and shoes" in
International Class 25.¹

¹ Serial No. 75/915,192, filed February 1, 2000. The application
contains an allegation of a bona fide intention to use the mark
in commerce.

The examining attorney refused registration under Section 2(e)(1) on the ground that applicant's mark is merely descriptive of the goods. 15 U.S.C. § 1052(e)(1). When the examining attorney made the refusal to register final, applicant filed a notice of appeal. Both applicant and the examining attorney have submitted briefs, but no oral argument was requested.

Before we discuss the merits of the case, we must clarify what is the mark on appeal. The application itself and the drawing in this case clearly show the mark for which applicant seeks registration as PHASHIONS. In the first Office action, the mailing label and the body of the Office action refer to the mark as PHASHIONS. However, in applicant's response to this Office action, the mark is spelled PHASIONS without a second "h." In the next Office action, the mailing label and the body of the Office action again refer to the mark as PHASHIONS. In its notice of appeal and Appeal Brief, applicant continues to refer to its mark as PHASIONS without the second "h." In her appeal brief, the examining attorney for the first time refers to the mark as PHASIONS. Despite these inconsistencies, it is clear that applicant applied to register the mark PHASHIONS. An application must contain a drawing that "shall be a substantially exact representation of the mark

as intended to be used on or in connection with the goods." 37 CFR § 2.51(a)(2). There are no specimens in this intent to use application nor is there anything to indicate that at the time the mark was filed the mark was anything other than PHASHIONS. Applicant cannot change its mark by spelling it differently in its later filed papers. Accord In re Hacot-Colombier, 105 F.3d 616, 41 USPQ2d 1523, 1527 (Fed. Cir. 1997) ("[T]o grant Hacot-Colombier the benefit of the priority date would allow a party seeking the benefit of a foreign priority date to file any drawing, then conform the drawing to the foreign filing at a later date. The statutory and regulatory rules are not so loose"); Visa International Service Association v. Life-Code Systems, 220 USPQ 740, 743 (TTAB 1983) ("The general test of whether an alteration is material is whether the mark would have to be republished after the alteration in order to fairly present the mark for purposes of opposition"). Therefore, since applicant has clearly applied to register the mark PHASHIONS, we will only discuss that mark. If applicant intends to seek registration for another mark, it must file a new application for that term.

In her final Office action, the examining attorney held that "PHASHIONS is a novel spelling of the word FASHIONS"

(p. 2) and she submitted evidence that "fashions" is a term used to describe clothing. First, the examining attorney supplied a definition of fashion as meaning "something, such as a garment, that is in the current mode: *Her dress is the latest fashion.*"² In addition, the evidence included printouts showing that the term "fashion" is used to refer to clothing. Examples from these printouts include:

Barbara Glass, WMAQ-Channel 5's fashion editor, will host the show, which features **fashions** from stores in the Gurnee mall.

Chicago Daily Herald, March 18, 2001, p. 2.

As commentator for fashion shows on the main stage, she will focus on the fun and romance of **fashions**. Salsa dancing and hip music will add flair to the parade of clothing.

Knoxville News-Sentinel, March 13, 2001, p. B1.

The fashion show will feature historically inspired clothing from the American Girls Collection. Local models will present **fashions** while commentary and period music brings the past alive.

The Tennessean, October 19, 2000, p. 3D.

Because of rap's influence on street **fashions** -- typically baggy, brightly colored clothing - it has become common for apparel designers to advertise through concert sponsorship.

Baltimore Sun, August 6, 2000, p. 1D.

The event will feature **fashions** from Canal Clothing.

Ft. Worth Star-Telegram, March 10, 2000, p. 6.

The show will reflect the tournament's entry into the new millennium with futuristic **fashions**. One portion of the show featuring animal print clothing will include a live leopard.

² *The American Heritage Dictionary of the English Language* (1992).

News and Observer (Charlotte, NC), February 27, 2000, p. A1.

Fashion Cents and One Price Clothing Store, both of which offer low-to moderate-priced women's **fashions**. *Virginian-Pilot*, January 21, 2000, p. D1.

The examining attorney also included copies of registrations in which the term "fashion" was disclaimed for various clothing items. The examining attorney found that the term PHASHIONS "does give the commercial impression of FASHIONS because of the commonality of the spelling -ASHION" (final Office action, p. 2) and held the term was merely descriptive for applicant's clothing. Applicant, on the other hand, argues primarily that its mark creates a commercial impression that is different from the term "fashion" and that it is not merely descriptive.³

We agree with the examining attorney that the term PHASHIONS is merely descriptive, and we, therefore, affirm the refusal to register the mark under Section 2(e)(1) of the Trademark Act.

A mark is merely descriptive if it immediately describes the ingredients, qualities, or characteristics of the goods or services or if it conveys information regarding a function, purpose, or use of the goods or services. In re Abcor Development Corp., 588 F.2d 811, 200

USPQ 215, 217 (CCPA 1978). See also In re Nett Designs, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). We look at the mark in relation to the goods or services, and not in the abstract, when we consider whether the mark is descriptive. Abcor, 200 USPQ at 218. Courts have long held that to be "merely descriptive," a term need only describe a single significant quality or property of the goods. In re Gyulay, 820 F.2d 1216, 3 USPQ2d 1009, 1009 (Fed. Cir. 1987); Meehanite Metal Corp. v. International Nickel Co., 262 F.2d 806, 120 USPQ 293, 294 (CCPA 1959).

We start by noting that there is ample evidence in the record to support the examining attorney's conclusion that the term "fashion" is at least descriptive for clothing items. The dictionary definition, printouts, and registrations demonstrate that the term "fashion" is a term commonly used to describe clothing. The only question in this case is whether the term "phashions" is likewise merely descriptive for clothing items. We find that prospective purchasers would recognize "phashions" as simply a slight misspelling of the term "fashions." The Supreme Court has held that:

The word, therefore is descriptive, not indicative of the origin or ownership of the goods; and being of

³ Underlying applicant's argument is its misspelling of the mark identified in its intent to use application.

that quality, we cannot admit that it loses such quality and becomes arbitrary by being misspelled. Bad orthography has not yet become so rare or so easily detected as to make a word the arbitrary sign of something else than its conventional meaning...

Standard Paint Co. v. Trinidad Asphalt Mfg. Co., 220 U.S. 446, 455 (1911).

Other cases have recognized that a slight misspelling does not change a merely descriptive term into a suggestive term. See Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938) (NU-ENAMEL; NU held equivalent of "new"); In re Quik-Print Copy Shops, 616 F.2d 523, 205 USPQ 505, 507 n.9 (CCPA 1980) (QUIK-PRINT held descriptive; "There is no legally significant difference here between 'quik' and 'quick'"); Hi-Shear Corp. v. National Automotive Parts Association, 152 USPQ 341, 343 (TTAB 1966) (HI-TORQUE "is the phonetic equivalent of the words 'HIGH TORQUE'"); and In re Organik Technologies Inc., 41 USPQ2d 1690 (TTAB 1997) (ORGANIK).

Similarly here, applicant's mark merely substitutes the letters "ph" for the letter "f." The letters "ph" could easily be pronounced the same as the "f" in fashions. See King-Kup Candies, Inc. v. King Candy Co., 288 F.2d 944, 129 USPQ 272, 273 (CCPA 1961) ("It is clear, therefore, that the syllable 'Kup,' which is the full equivalent of the word 'cup,' is descriptive"); Andrew J. McFarland, Inc.

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v. Montgomery Ward & Co., 164 F.2d 603, 76 USPQ 97, 99 (CCPA 1947) ((KWIXTART merely descriptive for electric storage batteries); Norsan Products Inc. v. R.F. Schuele Corp., 286 F. Supp. 12, 159 USPQ 689 (E.D. Wis. 1968) (KUF'N KOLAR equivalent of "cuff and collar"); Keller Products, Inc. v. Rubber Linings Corp., 213 F.2d 382, 101 USPQ 307 (7th Cir. 1954) (KOVE equivalent of descriptive term "cove). When confronted with the word PHASHIONS on clothing, customers would recognize the term as a simple misspelling of the term "fashion" commonly used to describe clothing.

Therefore, applicant's applied-for mark PHASHIONS is merely descriptive for applicant's clothing for men, women and children.

Decision: The examining attorney's refusal to register the mark PHASHIONS on the ground that it is merely descriptive of the identified goods is affirmed.